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91-852

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

OPTIMISM, INC., a California corporation; DAVID DROZEN, an individual; SHERYL R. KAY, an individual,
Petitioners,

v.

ALPHONSE MOUZON, individually, and doing business as MOUZON MUSIC COMPANY, MOUZON PRODUCTION COMPANY, and MPC RECORDS,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EVAN S. COHEN
Counsel of Record
S. MARTIN KELETI
of the California and District of Columbia Bars
Of Counsel
COHEN AND LUCKENBACHER
740 North La Brea Avenue
Los Angeles, California 90038-3339
(213) 938-5000
Attorneys for Petitioners

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5631 • FAX: (213) 747-5843

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QUESTIONS PRESENTED

1. Does the Due Process Clause prevent a district court from holding a party in contempt for an act not specifically enjoined in its order?

2. Must a party ultimately held in contempt of court attack the order directly, when the party initially admits its validity, but later objects to its application to unnamed acts?

3. Must a court of appeals rule on or review all issues an appellant presents?

LIST OF PARTIES

The names of all parties appear in the caption of the case. Sup. Ct. Rule 14.1(b).

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No.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Optimism, Inc., David Drozen, and Sheryl R. Kay respectfully pray that this honorable court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this proceeding, entered on August 26, 1991.

I
REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not been reported, and is reprinted in Appendix A.

The opinion of the United States District Court for the Central District of California has not been reported. The district court's judgment is reprinted in Appendix C and its findings of fact and conclusions of law in Appendix D.

II
JURISDICTION OF THIS COURT

The United States Court of Appeals for the Ninth Circuit entered its judgment on the appeal from the United States District Court for the Central District of California, in the form a memorandum opinion, on August 26, 1991.

The Ninth Circuit entered its order denying petitioners' petition for rehearing on September 27, 1991; that order is reprinted in Appendix E.

Petitioners invoke the jurisdiction of this court to review the judgment of the Ninth Circuit by writ of certiorari under 28 U.S.C. § 1254(1).

III
CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment of the United States Constitution provides in part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. V.

Federal Rule of Civil Procedure 65(d) provides:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in its terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

IV
STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

Petitioner Optimism, Inc. ("Optimism") is a California corporation engaged in the business of manufacturing and distributing phonorecords for sale to the public. Petitioners David Drozen, and Sheryl Kay are President and Vice-President of that corporation, respectively.[1] Respondent Alphonse Mouzon ("Mouzon") is a musician, songwriter, and record producer.

In September, 1986, Optimism and Mouzon entered into two agreements which granted Optimism an exclusive license in the copyrights to certain sound recordings of jazz music. The agreements contained terms limiting the territory of the license, and a third agreement between Optimism and Mouzon granted Optimism rights to additional sound recordings.

From 1986 to 1988, Optimism manufactured and released four jazz albums under the terms of the agreements between it and Mouzon.

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[1] All further references to Optimism include all petitioners.

B. PROCEDURAL BACKGROUND.

In June, 1988, however, Mouzon filed suit against Optimism and its officers (petitioners), alleging 25 separate claims.[2]

The district court held a bench trial on June 29 and 30, 1989. On August 11, 1989 the district court issued its findings of fact and conclusions of law, and announced its proposed judgment. The district court held for Optimism on 24 of the 25 claims; the district court held for Mouzon on a single claim, finding Optimism liable for one count of copyright infringement stemming from Optimism's shipment of a small number of phonorecords to Greece in violation of the territorial limitations in the agreements. At that hearing, the district court also informed Optimism that it would issue an injunction prohibiting Optimism from future violations of the territorial limitations in the agreements.

On August 24, 1989, the district court issued its written judgment, filed on August 29 and entered on August 31. The judgment prohibited Optimism from "violating the terms" of the agreements, as well as from "selling, distributing, or reproducing" any so-called "sampler" albums containing Mouzon's recordings.

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[2] These included five claims for copyright infringement and four for breach of contract, as well as claims for violation of the Lanham Act, interference with contractual relations, fraud, negligent misrepresentation, intentional infliction of emotional distress, injunctive relief, and attorney fees.

On October 25, 1989, the district court issued a second order, pursuant to a stipulation between Optimism and Mouzon, requiring Optimism to make reasonable efforts to correct copyright notices on certain phonorecords.

On March 12, 1990, Mouzon moved the district court to hold Optimism in contempt, alleging that Optimism had violated the district court's orders of August 24, and October 25, 1989.[3] The district court held a hearing on the motion on April 2, 1990 and received final arguments and evidence 10 days later. On July 5, 1990, the district court found Optimism in contempt of court. Optimism appealed. The Ninth Circuit Court of Appeals affirmed, not on the merits, but on the grounds that Optimism should have filed a "direct appeal" of the district court's injunctive order, and denied Optimism's petition for rehearing.

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[3] Mouzon alleged that Optimism: (1) engaged in acts which Mouzon believed breached the agreements; (2) continued to sell "sampler" albums; and (3) failed to correct copyright notices. The first two of these would come under the August 21 order, the third under the October 25. Mouzon did not allege, however, that Optimism breached the terms of the agreement pertaining to territorial limitations, the only type of breach the district court had held Optimism had ever committed.

V
JURISDICTION OF THE TRIAL COURT

The district court had original jurisdiction over the action because the action arose under an Act of Congress relating to copyrights, more particularly, the Copyright Act of 1976, as amended, Title 17, United States Code, pursuant to 28 U.S.C. § 1338(a).

VI
ARGUMENT

The district court's order of contempt violated Optimism's rights to due process of law, in that the district court's earlier orders failed to put Optimism on notice that the court would interpret its earlier orders to encompass the conduct that it ultimately held violated its orders; although the order was not void for vagueness at its inception, the court *applied* the order in an unexpected and surprising fashion which violated Optimism's due process rights.

The court of appeals perpetuated the due process violation by affirming the district court's ruling. Furthermore, the court of appeals erred by holding that Optimism should have filed a "direct appeal" and by failing to consider all of Optimism's exceptions to the judgment holding Optimism in contempt of court.

The argument below will address each of the three questions presented individually.

A. THE DISTRICT COURT'S HOLDING OPTIMISM IN CONTEMPT VIOLATED OPTIMISM'S DUE PROCESS RIGHTS BECAUSE OPTIMISM RECEIVED NO ADEQUATE OR FAIR NOTICE THAT THE CONDUCT HELD TO CONSTITUTE CONTEMPT OF COURT WAS PROHIBITED.

The district court violated Federal Rule of Civil Procedure 65(d) when it held Optimism in contempt for several minor alleged contractual breaches because the district court's injunction did not even hint that district court intended to prohibit such conduct. The Rule requires that an injunction "shall be specific in terms." As the Court has emphasized previously:

> [T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. . . . Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.

Schmidt v. Lessard, 414 U.S. 473, 477, 94 S. Ct. 713, 715, 38 L. Ed. 2d 661 (1974).

Parties are not required to guess at the nature of the acts which are prohibited by an injunction. And, in

the context of the actual events of the trial and the district court's findings of fact, it was fundamentally unfair for the district court to have required Optimism to have guessed that even the pettiest contractual dispute would be subject to the injunctive order. A party may not be held in contempt of an order unless it is specific and definite, and puts the party on notice, in clear and unambiguous terms, as to what acts are prohibited. *Gifford v. Heckler*, 741 F.2d 263, 265 (9th Cir. 1984).

Ostensibly, the injunction against "violating the terms" of the license agreements *only* dealt with breaches of the territorial restrictions of the license agreements. The colloquy between the district court and counsel for Optimism bears this out. *See* Reporter's Transcript of Proceedings of August 11, 1989, attached to the Findings of Fact and Conclusions of Law, Appendix D. Optimism was willing to accept this injunction, and did not appeal. Then, almost one year later, in July, 1990, Optimism was absolutely shocked to find that the district court applied the narrow scope of the injunction to Mouzon's various claims of minor, picayune contractual breaches.

This Court has held that a federal court must "frame its orders to that those who must obey will know what the court intends to require and what it intends to forbid." *International Longshoremen's Ass'n Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 88 S. Ct. 201, 19 L. Ed. 2d 236 (1967). A contempt citation cannot stand unless the injunctive order is "as specific and definite as the subject matter permits." *Navel Orange Admin. Comm. v. Exeter Orange Company, Inc.*, 722 F.2d 449 (9th Cir. 1983).

In the instant case, the injunctive order was certainly not "as specific and definite as the subject matter permits." Unless this requirement is met, a party cannot be, consistent with the Due Process clause, subjected to the contempt sanction.

For these reasons, the surprise order of the district court, holding Optimism in contempt for acts which were never prohibited, should be reviewed by this Court.

B. OPTIMISM COULD NOT HAVE FILED A "DIRECT APPEAL" OF THE INJUNCTIVE ORDER, BECAUSE IT DID NOT QUESTION THE MERITS OF THE INJUNCTIVE ORDER, BUT RATHER THE SUBSEQUENT APPLICATION OF THAT ORDER TO ACTS IT DID NOT MENTION.

Optimism had no reason to file a direct appeal if it could only understand the injunctive order of August 31, 1989 to apply only to breaches of the territorial restrictions of the agreements. Optimism did not take a direct appeal because Optimism could not know (or predict) that the injunction would be held to apply to wholly unrelated issues occurring months later. Simply put, Optimism had *no notice* that *any* contractual dispute would carry with it the threat of a contempt citation.

Neither case the court of appeals cites in support of its conclusion that Optimism should have filed a direct appeal involves a situation in which a party acknowledges the injunctive order is valid, but that the

district court unfairly *applied* the order to acts not within in its scope.

This was certainly not the case in *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987). There, the party held in contempt disobeyed the district court's order on the ground that there were "exceptional circumstances" not to obey it.

Nor was this the case in *Sidney v. Zah*, 718 F.2d 1453 (9th Cir. 1983). There, the contemnors appealed a contempt order which merely reaffirmed a previous injunctive order; the court of appeals held it was improper to appeal the earlier injunctive order indirectly by appealing a contempt order.

In distinction to those cases, Optimism never claimed the injunctive order was void in any way. Similarly, in *Maness v. Myers*, 419 U.S. 449, 95 S. Ct. 584, 42 L. Ed. 2d 574 (1975) and *Chapman v. Pacific Telephone & Telegraph Co.*, 613 F.2d 193 (9th Cir. 1979), two cases which *Crystal Palace* cites in support of the necessity for a direct appeal in the orders of the district courts were "specific and definite," but the parties held in contempt did not believe that the courts had the constitutional power to issue the orders. There was not even a question in those cases of whether the party charged with contempt knew exactly what acts were prohibited.

Finally, *Sidney v. Zah*, *supra*, merely affirms the principle that if one believes an injunctive order is invalid, one must file a direct appeal. But Optimism has never stated at *any* time that the district court's orders are void for vagueness; nor has Optimism ever argued that the orders are invalid for any other reason.

Put in the simplest terms, Optimism takes the position that because the district court gave Optimism insufficient notice of the acts the district court would *later* interpret as prohibited by its injunctive order, Optimism could not have directly appealed the order, because the unfair application of that order had not yet occurred.

C. THE COURT OF APPEALS FAILED TO RULE ON SEVERAL MATTERS ON WHICH OPTIMISM *DID* FILE A DIRECT APPEAL.

Even if this Court holds that Optimism should have filed a direct appeal of the injunctive order, there are still the issues brought before the court of appeals that were contained in the Order of Contempt, dated July 5, 1990, on *direct* appeal. In that order, which Optimism appealed in a timely fashion on July 18, 1990, the district court ordered Optimism to pay certain monies to Mouzon. Although these issues were extensively briefed by the parties, the court of appeals did not rule on them. Because the district court is holding a significant amount of money pending the outcome of these issues, it is proper that the court of appeals address them.

The court of appeals should have ruled on these matters,[4] but failed to do so. The order to pay money in the context of a contempt proceeding is a final decision, appealable under 28 U.S.C. § 1291. *Crystal Palace*, *supra*, 817 F.2d at 1363. Because of these three issues, the district court ordered Optimism to pay money. Optimism appealed in a timely manner.

It is thus proper that the court of appeals should rule on these matters, and its order refusing a rehearing of these matters should be reversed.

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[4] Although briefed in detail by the parties in the court of appeals, the issue remains whether Optimism owes Mouzon any additional money to Mouzon for phonorecords which Optimism initially shipped but accepted returns for full credit. The issue also remains whether Optimism owes Mouzon any more royalties for foreign sales, a point the district court decided in Optimism's favor at trial, but which the district court interpreted differently in the context of its Order of Contempt. Finally, there remains the issue of whether Optimism must pay Mouzon for a non-"Alphonse Mouzon" album, even though the course of dealings between the parties indicated the contrary.

VII
CONCLUSION

This case presents an egregious violation of due process rights, and this Court should not allow it to stand uncorrected. A party should not be required to guess at how a district court will apply an injunctive order at some future time. Neither the Constitution's Due Process Clause nor Federal Rule of Civil Procedure 65(d) permit this.

This appeal is procedurally proper: the injunctive order at issue was not vague on its face, so petitioner had no grounds to appeal the order's validity by virtue of a "direct appeal"; rather, petitioner appealed the injunctive order indirectly, only after the district court held petioner in contempt of court for a violation of the injunctive order resulting from the district court's surprising manner of interpreting its order.

The Court should grant certiorari to address these issues.

Respectfully submitted,

COHEN AND LUCKENBACHER

By:

EVAN S. COHEN

Dated: November 21, 1991

APPENDIX A

FILED
AUG 26 1991
Cathy A. Catterson,
Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALPHONSE MOUZON, individually, and dba MOUZON MUSIC COMPANY, MOUZON PRODUCTION COMPANY, and MPC RECORDS, Plaintiff-Appellant, v. OPTIMISM, INC., a California corporation; DAVID DROZEN, an individual; SHERYL R. KAY, aka SHERYL R. DROZEN an individual, Defendants-Appellees.	Nos. 89-56317 and 90-55899 D.C. No. CV 89-1300 SVW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Steven V. Wilson, District Judge, Presiding
Argued and Submitted, July 10, 1991
Pasadena California

Before: REINHARDT and FERNANDEZ, Circuit Judges, and CROCKER,** District Judge

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

**Honorable M. D. Crocker, Senior United States District Judge, Eastern District of California, sitting by designation.

Alphonse Mouzon appeals the judgment, after a bench trial, in his action alleging violations of the Copyright Act, 17 U.S.C. § 101, *et seq.*, the Lanham Trade-Mark Act, 15 U.S.C. § 1125(a), as well as breach of contract claims under California law. Optimism, Inc. appeals the order of contempt against it for violation of the injunction entered by the Court on August 31, 1989 as well as the stipulation and order of October 25, 1989 regarding correction of certain copyright notices.

We affirm in part, and reverse and remand in part, the judgment of the district court for reconsideration of the issues of Optimism's use of certain of Mouzon's music in its sampler albums, and attorney's fees. We affirm the order of contempt.

STATEMENT OF THE CASE

Alphonse Mouzon, individually and doing business as Mouzon Music Company, Mouzon Production Company and MPC Records (collectively referred to herein as "Mouzon"), is a producer, musician, songwriter and jazz recording artist. Optimism, Inc. is a California corporation engaged in the manufacture and distribution of phonograph records, and David Drozen and Sheryl R. Kay, husband and wife, are the principal officers of that company (hereinafter referred to as "Optimism").

Mouzon and Optimism entered into two written Lease Agreements on September 16, 1986, wherein Optimism agreed to pay royalties and certain advance against royalties to Mouzon for the exclusive right to manufacture, distribute and sell certain sound recordings contained in two Mouzon albums entitled LOVE

FANTASY and MORNING SUN throughout the United States, Canada and Mexico for five years. Mouzon also agreed to deliver to Optimism at least one additional jazz album per year during the term of the agreement. On September 18, 1986, by Addendum to the agreement Optimism was granted worldwide distribution rights to LOVE FANTASY, with the exclusion of Europe and Japan. By further amendment to the agreements on July 9, 1987, Japan was added to Optimism's distribution territory for the albums LOVE FANTASY and BACK TO JAZZ, which had been delivered to Optimism pursuant to the agreements.

After a bench trial, the court entered judgment for Mouzon awarding statutory damages under 17 U.S.C. § 504(c) for sales of albums outside the territorial limits of the agreements, and an injunction generally prohibiting violation of the agreements, and specifically enjoining the sale, distribution or reproduction of any sampler albums that included Mouzon's works without express written permission from Mouzon to do so.

After trial but prior to Mouzon's appeal, the parties attempted to reach a settlement agreement. The settlement negotiations were reflected in correspondence between the parties which set out the terms, one provision of which contemplated that Mouzon would forego any contempt proceedings against Optimism. Mouzon's appeal was filed during this time period, and Mouzon subsequently brought contempt proceedings against Optimism.

The district court entered its order adjudging Optimism in contempt of court for continuing to use Mouzon's music on its samplers, withholding royalties

and failing to correct the copyright designations pursuant to the stipulation entered on October 25, 1989. Optimism appeals the order of contempt.

DISCUSSION

Mouzon alleges a number of errors by the district court in the scheduling and conduct of the trial. Mouzon contends the court abused its discretion when it denied his motion for continuance, and in limiting witnesses' testimony pursuant to Loc.R. of C.D.Cal. 9.11.2, as well as in bifurcating the trial. These issues are within the sound discretion of the trial judge and will not be overturned on appeal absent a showing of clear abuse. Ungar v. Sarafite, 376 U.S. 575, 589 (1964); *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985). Mouzon has made no showing of abuse of discretion by the court nor any prejudice as a result of the scheduling and conduct of the trial

Mouzon next argues that the court failed to shift the burden of proof to Optimism when Optimism raised the "first sale defense" on certain sales Mouzon alleged were for distribution in France. Mouzon contends he presented evidence that Optimism's sales to Mr. Phillipe Lebras were distributed in France and that Optimism was aware this would occur when the sales were made. In order to shift the burden of proof to Optimism under the first sale doctrine, plaintiff is required to show that the first sale was unlawful. This Mouzon failed to do. The district court found that Optimism's sales to Mr. Lebras were for distribution in Canada. This finding is supported by the record, and is not clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 575

(1984); *Cooling Systems & Flexibles v. Stuart Radiator*, 777 F.2d 485, 487 (9th Cir. 1985). As a result of the factual findings here, there was no occasion for the court to shift the burden of proof, because the court found that the sales to Mr. Lebras were intended for distribution in Canada which is within the territorial limits of the agreement.

Mouzon also contends that Optimism's use of a vinyl recording rather than his master tape to manufacture the MORNING SUN album constituted copyright infringement. The cases cited by Mouzon in support of his argument are inapposite because the parties in those cases were not parties to an exclusive licensing agreement as here. We agree with the district court that because the licensing agreements provided that Optimism was the exclusive licensee for the manufacture and distribution of this album for a period of five years, their production of a duplicate master tape from a vinyl recording during the period of the exclusive license cannot have resulted in copyright infringement.[1]

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[1] Mouzon argued that he refused to turn over the master tapes because Optimism had breached the agreements, and he had notified Optimism that he was rescinding the agreements. The district court found that Optimism had not breached the agreements. Mouzon contends that he specifically notified Optimism that the agreement was rescinded; however, the record does not contain the notification or reveal the date of such attempted rescission. Whether or not this notification was as Mouzon alleges is not critical, because the record

Mouzon also argues that the district court erred in determining that Optimism's packaging of the albums MORNING SUN and BACK TO JAZZ was not deceptive nor a violation of the Lanham Act. We do not agree that the district court applied an incorrect legal standard. Rather, the district court was mindful of the legal requirements, and determined that Mouzon had failed to show any confusion or harm. Mouzon presented the testimony of two witnesses to show the likelihood of confusion. The district court properly made credibility determinations, and found that Mouzon had failed to provide any credible evidence of confusion. The findings are not clearly erroneous, and thus will not be disturbed on appeal.

The district court's finding that the defendants had not breached the agreements is correct because the allegations of breach of contract are primarily based upon the Mouzon's unsuccessful allegations of Copyright and Lanham Act violations. Insofar as the court found that Optimism violated the copyright, the court noted that the minor violations, *i.e.*, distribution of some albums to Greece and promotional albums to England, which is outside the territorial limits of the license, did not constitute a material breach sufficient to give rise to the right of rescission, and further, that Mouzon had failed to tender back the benefits he had received in

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clearly supports the district court finding that the alleged rescission was ineffective because Mouzon failed to tender back the benefits he received, and Mouzon does not dispute this finding.

order to support his claim for rescission. Thus, for the reasons stated by the district court, the judgment as to these issues is affirmed.

With regard to the sampler albums produced and distributed by Optimism, we reverse the judgment of the district court on this issue, and remand for clarification because the judgment of August 31, 1989 is inconsistent.

The district court found that "the samplers under the conditions of this case don't constitute a copyright violation." Although this statement appears to indicate that the agreements allow distribution of the samplers under the facts of this case, the district court enjoined distribution of the samplers. "Optimism is enjoined from selling, distributing, or reproducing any sampler albums that include Mouzon's works unless Optimism obtains Mouzon's express written permission to do so."[2]

The order of contempt is affirmed as to all issues including the sampler albums. The issues raised by Optimism attack the merits of the underlying injunction and those issues must be raised on direct appeal. They may not be challenged in this appeal from the district court's finding of contempt for failing to comply with that order. *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987); *Sidney v. Zah*,

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[2] In light of our remand for clarification of the copyright issue as to the samplers, we are not required, and do not, reach the question of how the rule of custom and practice applies in copyright law.

718 F.2d 1453, 1457 (9th Cir. 1983).[3] Insofar as the Order of Contempt is directed at sales of sampler albums the rule is applicable notwithstanding our reversal of the underlying order sua sponte on the ground of inconsistency. Optimism failed to raise the sampler issue, as well as the others, on direct appeal from the underlying order and accordingly is bound by the injunction. However, Optimism may not be held in contempt for any sampler violations occurring after the effective date of our order unless and until the district court issues a new order respecting that matter.

With regard to Mouzon's argument that, as the prevailing party, he should have been awarded attorney's fees, the court notes that this issue was raised in the district court in Mouzon's motion for reconsideration and again on this appeal. In light of our decision to remand on the sampler issue, the district court is not barred from reconsidering whether or not to award attorney's fees to Mouzon on remand. The parties shall bear their own costs on appeal.

Affirmed in part; reversed and remanded in part.

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[3] Having unsuccessfully sought dismissal of Mouzon's appeal based upon a purported settlement agreement, Optimism again raises the issue in the context of its appeal from the court's finding of contempt. Whether considered as a part of Mouzon's appeal or in the context urged by Optimism, the court finds no error in the district court's determination that no settlement agreement had been reached.

APPENDIX B

ENTERED
Clerk,
U.S. District Court
JUL 12 1990
Central District
of California
By Deputy

FILED
JUL -5 1990
Clerk,
U.S. District Court
Central District
of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALPHONSE MOUZON, an individual, and dba MOUZON MUSIC COMPANY, MOUZON PRODUCTION COMPANY, and MPC RECORDS,

Plaintiff,

v.

OPTIMISM, INC., a California corporation; DAVID DROZEN, an individual; SHERYL R. KAY, aka SHERYL R. DROZEN an individual,

Defendants.

CASE NO.
CV 89-1300-SVW

ORDER ADJUDGING DEFENDANTS IN CONTEMPT OF COURT

This case arises from a judgment against defendant, Optimism Inc., et al., ("Optimism") as a result of sixty-five copyright violations of plaintiff, Alphonse Mouzon's copyrighted songs. The judgement issued by the court on August 31, 1989 included injunctions enjoining Optimism from 1) violating the terms of its September 18, 1986 Lease Agreement with Mouzon, and both the September 18, 1986 and July 9, 1987 Addendums to the September 18, 1986 Lease Agreement; 2) selling, distributing or reproducing any sampler albums containing Mouzon's work without his express written consent. In addition, the court issued an order on October 25, 1989 regarding correction of copyright notices. Optimism was ordered to manufacture and distribute stickers to its central distributor and each regional distributor and direct them to affix these stickers on all copies of Morning Sun and Back to Jazz phonorecords. Furthermore, Optimism was also ordered to request that each regional distributor, in turn, direct the local distributors and retail stores to affix those stickers upon all copies of those two phonorecords.

After the trial and prior to Mouzon's appeal on all other allegations dismissed by the trial court, the parties attempted to enter into a settlement agreement. One provision of the agreement contemplated that Mouzon forgo any contempt proceeding against Optimism. This settlement was negotiated through several correspondences between plaintiff's attorney, Linda Mouzon and defendant's attorney, Evan Cohen.

The issue before the court is whether Optimism is in contempt of court for violating the court orders of

August 31, 1989 and October 25, 1989. Mouzon claims that

a) there was never a final settlement agreement and he did not forgo contempt proceedings against Optimism;

b) Optimism violated the court order of August 31, 1989 by withholding Mouzon's royalties in violation of the September 18, 1986 the Lease Agreement;

c) Optimism violated the court order of August 31, 1989 by refusing to accept delivery of the recording Magic Mirror and refusing to pay $7,500 advance for the recording in violation of the September 18, 1986 Lease Agreement;

d) Optimism violated the court order of August 31, 1989 by continuing to reproduce, sell and distribute "samplers" including Mouzon's work without his express written permission;

e) Optimism violated the court order of October 25, 1989 by failing to provide distributors and local retail stores with stickers reflecting correct copyright notices of Mouzon's sound recordings on Morning Sun and Back to Jazz.

DISCUSSION

A. Enforceability of Settlement Agreement

The threshold question before the court is whether an enforceable settlement agreement exists in which Mouzon agreed to forgo any contempt proceedings against Optimism. Optimism argues that the correspondence between Mr. Cohen and Mrs. Mouzon

constituted a settlement agreement enforceable by the court. After reviewing Mrs. Mouzon's letters dated January 23, 1990, February 5, 1990, February 12, 1990, February 28, 1990 and March 4, 1990, and Mr. Cohen's letters dated February 7, 1990 and March 1, 1990, the court finds that a final written settlement agreement was contemplated by the parties and until such an agreement was signed and executed, no settlement existed. This finding is in agreement with the order of the Ninth Circuit Court of Appeals which denied defendant's motion to remand to District Court for enforcement of settlement agreement. The order denied the motion "without prejudice to refiling upon obtaining a settlement agreement." (emphasis added)

In addition, the court finds persuasive existing California case law with regards to enforceability of settlement agreements. Although California Code of Civil Procedure Section 664.6 provides that "if parties to pending litigation stipulate, in writing or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgement pursuant to the terms of the settlement" (West 1987), two recent California cases interpreting section 664.6 held that, in addition to the requirement for a stipulation in writing, there is an implicit requirement that the writing be signed by the parties. City of Fresno v. Maroot, 189 Cal. App. 3d 755, 234 Cal. Rptr. 353, 357 (1987), Datatronic System Corp. v. Speron, 176 Cal. App. 3d 1168, 222 Cal. Rptr. 658 (1986). In the present case, neither party signed a formal settlement agreement or any of the correspondences between the attorneys.

Hence, the court concludes that no binding settlement agreement exists.

B. Failure to Pay Royalties to Mouzon

Mouzon contends that Optimism violated the August 31, 1989 court order by withholding royalties due to him without just cause. The court order of August 31, 1989 provides in part that:

> an injunction is hereby issued whereby Optimism is prohibited from violating the terms of its September 18, 1986 Lease Agreements with Mouzon and the terms of the September 18, 1986 Addendum to the September 18, 1986 Lease Agreement and July 9, 1987 Addendum to the September 18, 1986 Lease Agreement.

During the court's discussion with both parties on August 11, 1989, the court intentionally made the injunction broad so as to
prevent Optimism from violating the agreement in some other way in the future.

Optimism does not deny that it has withheld royalties from Mouzon. However, they argue that Mouzon's work has been subject to huge returns equal to the amount of royalties due plaintiff. The lease agreement provides that "Lessee and Lessor agree that Lessee shall hold in reserve against returns 25% of all monies received from sale of product." Since this is the only provision in the lease agreement pertaining to returns, the court finds this provision controlling and thus concludes that Optimism has violated the terms of

the lease agreement by holding more than 25% of monies received from the sale of goods.

With regard to the foreign royalties, Mouzon interprets the contract to say that he should receive 50% of the net proceeds received by Optimism. Mouzon claims that Optimism has interpreted the agreement otherwise. In order to avoid further dispute and ambiguity, the court is compelled to interpret the agreement between the parties. The agreement provides that foreign "royalties payable pursuant to this agreement shall be computed on fifty percent (50%) of the net proceeds received...rather than the royalty rate set forth hereinabove." Since this is the only clause in the agreement pertaining to foreign royalties, this clause is controlling. The court finds that the reasonable interpretation of the agreement provides that Mouzon should receive 50% of the net proceeds received by Optimism from foreign sales.

C. Magic Mirror Recording

Mouzon contends that Optimism refuses to accept a Magic Mirror recording and refuses to pay $7,500 advance for the recording. Optimism argues that Mouzon is not a featured artist on the album which justifies refusal of the recording. Mouzon responds by showing evidence that he need only be "involved" in the recording, and that he is, in fact, featured in the recording. Optimism has failed to provide sufficient evidence to rebut Mouzon's clear and convincing evidence and thus the court finds that Optimism has acted in bad faith by refusing to accept Mouzon's Magic Mirror recording.

D. Sampler Controversy

Mouzon contends that Optimism has violated the August 31, 1989 court order by continuing to sell samplers containing Mouzon's work without his permission. Evidence shows that Mouzon has not consented to further reproduction, distribution or sale of any samplers containing his work. Furthermore, five record stores have received samplers containing Mouzon's work after August 31, 1989 and as late as February, 1990. Finally, invoices from Navarre, one of Optimism's sub-distributors, show continuous distribution of the sampler. Based on this clear and convincing evidence, the court finds Optimism in violation of the August 31, 1989 court order.

E. Sticker Controversy

Mouzon contends that Optimism violated the October 25, 1989 court order by failing to supply distributors with stickers reflecting correct copyright notices. Optimism has provided evidence showing that stickers were manufactured and sent to their central distributor with further directions to forward them to thirteen sub-distributors. Optimism also claims that directions were given to their sub-distributors to forward stickers to retail stores asking them to affix the stickers on the existing stock of Morning Sun and Back to Jazz. However, Optimism has failed to show the court whether any of the thirteen sub-distributors received the copyright correction stickers. In addition, evidence provided by the Mouzon shows that at least seven Tower Records and Wherehouse record stores have not received any copyright correction stickers. In addition, many

invoices from Optimism to its central supplier to not contain reminders of the copyright correction. The court finds Optimism's efforts to comply with the October 25, 1989 court order insubstantial. Therefore, Optimism is in contempt of court for violating the October 25, 1989 court order.

Conclusion

Based on the foregoing, the court finds:

1) Optimism in violation of the court's August 31, 1989 order by withholding royalties due to Mouzon as enumerated in the December 26, 1989 royalty statement. Optimism is ordered to pay Mouzon the sum of $8,169.00 (total royalties less 25% reserve) plus interest. In addition, Optimism is ordered to pay Mouzon foreign royalties equal to 50% of the total net proceeds.

2) Optimism in violation of the court's August 31, 1989 order by refusing to accept Mouzon's "Magic Mirror" recording. Optimism is ordered to accept the "Magic Mirror" recording and pay Mouzon the $7,500.00 advance as specified under the agreement.

3) Optimism in violation of the court's August 31, 1989 order by continuing to sell samplers containing Mouzon's work without his permission. Optimism is ordered to notify all distributors and record stores within 30 days to cease distribution and sale of Optimism Samplers which contain Mouzon's work.

4) Optimism in violation of the court's October 25, 1989 order by failing to supply distributors with stickers reflecting correct copyright notices.

Optimism are ordered to manufacture and distribute adequate quantities of stickers as set forth in the order of October 25, 1989.

IT IS SO ORDERED.

DATED: July 5, 1990

STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

ENTERED
Clerk,
U.S. District Court
AUG 31 1990
Central District
of California
By Deputy

FILED
AUG 29 1990
Clerk,
U.S. District Court
Central District
of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALPHONSE MOUZON, ET AL., Plaintiff, v. OPTIMISM, INC., ET AL., Defendants.	CASE NO. CV-89-1300-SVW JUDGMENT

Pursuant to the Order filed herewith, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Plaintiff Alphonse Mouzon, et al., ("Mouzon") recovers $16,250.00 as a result of the violations by Defendant Optimism, Inc., et al., ("Optimism") of sixty-five of Mouzon's copyrighted songs. Under 17 U.S.C. § 504(c), the Court assesses a

two-hundred and fifty dollar statutory damage award per violation, resulting in this total award of $16,250.00 to Mouzon.

2. An injunction is hereby issued whereby Optimism is prohibited from violating the terms of its September 18, 1986 Lease Agreements with Mouzon and the terms of the September 18, 1986 Addendum to the September 18, 1986 Lease Agreement and July 9, 1987 Addendum to the September 18, 1986 Lease Agreement.

3. The term "Europe" as used in section 2 of the September 18, 1986 Agreement involving the master sound recordings of "Morning Sun" and "Distant Lover" and as used in section 2 of the September 18, 1986 Addendum means geographic Europe which necessarily includes Greece within its definition.

4. Optimism is further enjoined from selling, distributing, or reproducing any sampler albums that include Mouzon's works unless Optimism obtains Mouzon's express written permission to do so.

DATED: August 24, 1989

STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

APPENDIX D

ENTERED
Clerk,
U.S. District Court
AUG 31 1990
Central District
of California
By Deputy

FILED
AUG 29 1990
Clerk,
U.S. District Court
Central District
of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALPHONSE MOUZON, ET AL., Plaintiff, v. OPTIMISM, INC., ET AL., Defendants.	CASE NO. CV-89-1300-SVW FINDING OF FACTS AND CONCLUSIONS OF LAW

Having considered the parties' papers, exhibits, and declarations and the relevant case law and having heard several days of testimony and oral argument, the Court issued forth its findings of fact and conclusions of law in the hearing held on August 11, 1989.

The Court hereby incorporates these findings and conclusions orally made on the record during this hearing in this matter. A transcript of these findings and conclusions is included as Appendix A to this Order.

In summary, the Court holds that:

1. The only copyright damages for which Plaintiff Alphonse Mouzon, et al., ("Mouzon") can recover involve the violations by Defendant Optimism, Inc., et al., ("Optimism") of sixty-five of Mouzon's copyrighted songs. Under 17 U.S.C. § 504(c), the Court assesses a two-hundred and fifty dollar statutory damage award per violation, resulting in a total award of $16,250.00 to Mouzon.

2. An injunction shall be issued whereby Optimism is prohibited from violating the terms of its September 18, 1986 Lease Agreements with Mouzon and the terms of the September 18, 1986 Addendum to the September 18, 1986 Lease Agreement and July 9, 1987 Addendum to the September 18, 1986 Lease Agreement.

3. The term "Europe" as used in section 2 of the September 18, 1986 Agreement involving the master sound recordings of "Morning Sun" and "Distant Lover" and as used in section 2 of the September 18, 1986 Addendum means geographic Europe which necessarily includes Greece within its definition.

4. Optimism is enjoined from selling, distributing, or reproducing any sampler albums that

include Mouzon's works unless Optimism obtains Mouzon's express written permission to do so.

IT IS SO ORDERED.

DATED: August 24, 1989

STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

[APPENDIX A]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

- - -

HONORABLE STEPHEN V. WILSON,
JUDGE PRESIDING

- - -

ALPHONSE MOUZON, ET AL., Plaintiff, v. OPTIMISM, INC., ET AL., Defendants.	CASE NO. CV 89-1300-SVW

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

FRIDAY, AUGUST 11, 1989 9:00 A.M.

JUNE LAVONNE BENEDICT
OFFICIAL COURT REPORTER
402 UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CA 90012
(213) 617-7892

A P P E A R A N C E S:

FOR THE PLAINTIFF:

LINDA MOUZON
6320 VAN NUYS BOULEVARD, #407
VAN NUYS, CA 91401

DAVID E. FRANK
10100 SANTA MONICA BOULEVARD
LOS ANGELES, CA 90067

FOR THE DEFENDANT:

EVAN COHEN
740 NORTH LA BREA AVENUE
LOS ANGELES, CA 90038

TERRAN T. STEINHART
431 SOUTH FAIRFAX, 4TH FLOOR
LOS ANGELES, CA 90036

PROCEEDINGS

. . .

[THE COURT:]

SO I SUPPOSE THE RESULT OF THE WHOLE CASE, INSOFAR AS I SEE IT, IS THAT THE PLAINTIFF PROVED SEVERAL VERY MINOR COPYRIGHT VIOLATIONS. AND THAT WAS ALL.

DO YOU THINK THE PARTIES COULD ENTER INTO SOME SATISFACTORY FORM OF INJUNCTION?

MR. STEINHART: ABOUT SELLING TO EUROPE?

THE COURT: ABOUT THE COPYRIGHT VIOLATIONS. IN OTHER WORDS, THAT THERE WOULD BE NO SALES BEYOND THE TERMS OF THE AGREEMENT.

MR. STEINHART: DO YOU MEAN TO EUROPE? DO YOU MEAN GEOGRAPHICALLY, EUROPE?

THE COURT: YES.

MR. STEINHART: I THINK SO, YES.

. . .

THE COURT: ANYWAY, SO THAT IS THE AMOUNT: $16,250.00. AND AN INJUNCTION WHEREBY THE DEFENDANTS ARE ENJOINED FROM VIOLATING THE COPYRIGHT LAWS IN THE FUTURE BY SELLING PLAINTIFF'S WORKS

BEYOND THE TERRITORIAL RANGE OF THE AGREEMENT.

MR. STEINHART: COULD WE PUT INTO THE INJUNCTION BEING THAT AS IT PERTAINS TO EUROPE, WHAT IS KNOWN AS EUROPE GEOGRAPHICALLY?

THE COURT: NO.

MR. STEINHART: WE'RE JUST GOING TO PUT BEYOND --

THE COURT: NO. MAKE IT BROAD. MAYBE YOU'LL VIOLATE IT SOME OTHER WAY IN THE FUTURE.

MR. STEINHART: I HOPE NOT.

. . .

APPENDIX E

FILED
SEP 27 1991
Cathy A. Catterson,
Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALPHONSE MOUZON, dba: MOUZON MUSIC CO., MOUZON PRODUCTION CO., and MPC RECORDS Plaintiff-Appellant, v. OPTIMISM, INC.; DAVID DROZEN; SHERYL R. KAY, aka SHERYL R. DROZEN Defendants-Appellees.	Nos. 89-56317 and 90-55899 D.C. No. CV-89-1300-SVW O R D E R

Before: REINHARDT and FERNANDEZ, Circuit Judges; and M. D. CROCKER, District Judge*

Appellants' Petition For Rehearing is denied.

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* Honorable M. D. Crocker, Senior U.S. District Judge, for the Eastern District of California, sitting by designation.